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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, **Plaintiff and Respondent,** **v.** **DAVID JAMES RHODES,** **Defendant and Appellant.**	**A102393** **(Del Norte County Super. Ct. No. CFR 02-9377)**

Pursuant to a plea agreement, defendant David James Rhodes entered no contest pleas to one count each of forcibly committing a lewd act upon a child under the age of 14 years, committing an act of oral copulation with a child under the age of 14 years, forcibly committing an act of oral copulation, and intimidating a witness. Appellant also admitted that he had served two prior prison terms. In exchange, appellant was promised a prison term of between 16 and 23 years and the dismissal of all other pending charges. The court sentenced appellant to the maximum term under the agreement, including consecutive terms of six years for the act of oral copulation with a child under the age of 14 years and six years for the act of forcible oral copulation. On appeal appellant contends that because the two oral copulation convictions were based on a single act, the consecutive sentences were imposed in violation of Penal Code section 654.[1] We affirm the judgment and sentence.

[1] All undesignated section references are to the Penal Code.

FACTS AND PROCEDURAL HISTORY

On May 2, 2002, the 11-year-old victim (the Victim) reported to the police that she had been sexually assaulted at the home of her 13-year-old friend (her Friend) by appellant, a relative of her Friend. After the police interviewed the Victim she was taken to a hospital where she was given a sexual assault examination. The examination found sperm in her vagina, underwear, and pants. On May 7, 2002, a complaint was filed against appellant.

At the preliminary hearing on July 9, 2002, the Victim testified that she was visiting her Friend, when appellant came to the door and her Friend let him in. Her Friend went into an upstairs bedroom with appellant for about 10 minutes, and when they returned she had tears in her eyes. Appellant would not let her Friend talk to the Victim, and he had the Victim accompany him back to the upstairs bedroom. Once there appellant forced the Victim to orally copulate him and then physically restrained and raped her. After the rape, her Friend ran upstairs and partially entered the room. Appellant gave the Victim a small amount of cash and threatened her if she reported the incident. Approximately three days later, while the Victim was at her Friend's house, appellant called on the telephone and spoke to the Victim, offering her $300 to say that she had lied about the assault.

The deputy sheriff who had interviewed her Friend on May 2, 2002, also testified at the preliminary hearing. Her Friend told the deputy that earlier that day appellant forced her to orally copulate him and that she had witnessed the Victim orally copulate appellant. Her Friend also told the deputy that on two other occasions in the past few weeks appellant had forcibly raped her and sodomized her.

On July 10, 2002, an information was filed in Del Norte County charging appellant with offenses involving the Victim and her Friend. The information alleged four counts of a forcible lewd act upon a child (§ 288, subd. (b)(1)), two counts of forcible oral copulation (§ 288a, subd. (c)(2)), two counts of oral copulation of a person under 14 (§ 288a, subd. (c)(1)), one count of sodomy by use of force (§ 286(c)(2)), one count of sodomy of a person under 14 (§ 286, subd. (c)(1)), two counts of intimidation of

witness (§ 137, subd. (b)), two counts of bribery of a witness (§ 137, subd. (a)), one count of dissuading a witness by force or threat (§ 136.1, subd. (c)(1)), two prior prison term enhancements (§ 667.5, subd. (b)), two prior strike convictions (§§ 667, subd. (b)-(i), 1170.12), and a special allegation that appellant was subject to a mandatory life sentence (§ 667.61, subd. (e)(5)). Appellant was arraigned on July 12, 2002, and entered pleas of not guilty to all charges.

Prior to trial, her Friend recanted her testimony. Appellant subsequently negotiated an agreement to plead no contest to all charges relating to the Victim in exchange for the dismissal of all charges relating to her Friend. On February 7, 2003, appellant withdrew his not guilty pleas and entered no contest pleas to one count each of forcibly committing a lewd act upon a child under the age of 14 years, committing an act of oral copulation with a child under the age of 14 years, forcibly committing an act of oral copulation, and intimidating a witness. Appellant also admitted two prior prison term enhancement allegations and acknowledged he was subject to a prison term of between 16 and 23 years.

Appellant was sentenced on April 22, 2003, to a term of 23 years in prison. This term consisted of six years for each of the three sexual offenses, three years for intimidating a witness, and two one-year enhancements for his prior prison terms, all to be served consecutively. The following day appellant filed a timely notice of appeal.

DISCUSSION

I. *California Rules of Court, Rule 4.412(b)*

As an initial matter we must determine whether appellant may raise the issue of a section 654 error in this appeal. The People contend that the argument is barred by the plea agreement and the operation of California Rules of Court, rule 4.412(b) (hereafter rule 4.412(b)).[2] Under this rule, a defendant who plea bargains for a specified sentence

[2] "By agreeing to a specified prison term personally and by counsel, a defendant who is sentenced to that term or a shorter one abandons any claim that a component of the sentence violates section 654's prohibition of double punishment, unless that claim is asserted at the time the agreement is recited on the record." (Rule 4.412(b).)

waives the argument on appeal that a component of that sentence violates section 654's prohibition of double punishment. (See *People v. Hester* (2000) 22 Cal.4th 290, 295.) At issue here is whether an agreement to a sentencing range is the same as a specified sentence for purposes of the rule. We conclude that it is not.

In *People v. Cole* (2001) 88 Cal.App.4th 850, the defendant faced three charges that each carried a potential sentence of 25 years to life. (*Id*. at p. 873.) Had he been convicted and sentenced consecutively the maximum sentence would have been 75 years to life. (*Id*. at p. 858.) A plea agreement allowed the defendant to enter no contest pleas to each of the three counts in exchange for concurrent sentences. (*Id*. at p. 859.) Because the agreement allowed the defendant to argue that the court should not consider one of his prior convictions for purposes of the three strikes law, a sentence of less than 25 years to life was within the court's discretion. (*Id*. at pp. 873-874.) The court held that the agreement contemplated a specific prison term and that rule 4.412(b) applied. (*Cole*, at pp. 872-873.)

The People rely on language in *Cole* that suggests that rule 4.412(b) would apply to any agreement with a maximum term: "A negotiated maximum term in a plea bargain is no less integral than a negotiated specific term." (*People v. Cole, supra,* 88 Cal.App.4th at p. 868.) More recently, in *People v. Shelton* (2004) 117 Cal.App.4th 138, the court did not apply rule 4.412(b) to a plea agreement that contemplated a maximum term. (*Shelton*, at p. 141.) The defendant pled no contest to stalking and making a criminal threat and agreed to be sentenced to a maximum term of three years eight months. (*Id*. at p. 139-140.) Because the three year eight month maximum operated only as a "lid" and the defendant retained all arguments for a lower sentence, the court found there was no agreement for "a specified prison term" as required by rule 4.412(b). (*Shelton*, at p. 141.)

The result in *Shelton* is supported by the Supreme Court's ruling on a similar issue in *People v. Buttram* (2003) 30 Cal.4th 773. In determining whether a certificate of probable cause was required for a defendant to appeal a sentence imposed in accordance with a plea agreement, the court looked to rule 4.412(b) for the analogous principle that

" 'defendants are estopped from complaining of sentences to which they agreed.' " (*Buttram*, at p. 783, quoting *People v. Hester*, *supra*, 22 Cal.4th at p. 295.)[3] The court's ruling that a certificate of probable cause was not required was based on a sharp distinction between an agreed upon "lid" to a sentencing range and an agreed upon sentence. "When the parties negotiate a *maximum* sentence, they obviously mean something different than if they had bargained for a *specific* or *recommended* sentence." (*Buttram*, at p. 785.)

We agree with appellant that his section 654 argument is not barred by rule 4.412(b). The policy rationale that "defendants who have received the benefit of their bargain should not be allowed to trifle with the courts by attempting to better the bargain through the appellate process" is predicated on the defendant having bargained for "a *specified* sentence." (*People v. Hester*, *supra*, 22 Cal.4th at p. 295.) In *Cole*, pending the outcome of his motion to strike his prior convictions, the defendant bargained for a specific sentence. (*People v. Cole*, *supra*, 88 Cal.App.4th at pp. 872-873.) In *Shelton*, as here, the defendant bargained for the dismissal of pending charges, but otherwise agreed to be sentenced within an allowable range for the charges to which he agreed to plead. (*People v. Shelton*, *supra*, 117 Cal.App.4th at p. 141.) Appellant's plea was entered with the express understanding that the court retained normal sentencing discretion within the range of 16 to 23 years. Because this agreement did not encompass a specific sentence, rule 4.412(b) does not apply.

II. *Section 654*

On the merits, however, we reject appellant's section 654 argument. That argument rests on appellant's assertion that there was only one act of oral copulation committed against the Victim that was charged alternatively in two counts. A defendant who commits one criminal act or omission cannot be punished twice for that single offense. (See *People v. Siko* (1988) 45 Cal.3d 820, 823.) This argument was raised in

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[3] Additionally, the court discussed *Cole*, and found its reasoning on the certificate of probable cause issue persuasive without considering its ruling on the rule 4.412(b) issue. (*People v. Buttram, supra*, 30 Cal.4th at p. 786.)

the trial court, which implicitly rejected it. A trial court's finding that separate sentences are not barred under section 654 will be upheld if it is supported by substantial evidence. (See *People v. Ferraez* (2003) 112 Cal.App.4th 925, 935.)

The Victim testified at the preliminary hearing that appellant was alone in a room with her when he forced her to orally copulate him. She was clothed and sitting on a bed with appellant standing in front of her and grabbing her head. After the act of forced oral copulation appellant had her lie down on the bed and pull her pants down. Appellant then physically restrained and raped her. When appellant was finished the Victim pulled up her pants. The Victim testified that as she was pulling up her pants her Friend entered the room.

A deputy sheriff also testified that her Friend told her that after hearing the Victim cry out, her Friend looked into the room and saw the Victim with her pants down while appellant was removing his penis from the Victim's mouth.

Appellant first argued that both witnesses were describing the same act of oral copulation, in the context of a motion to withdraw his no contest pleas. In response, the prosecutor argued that the Victim had described one assault that occurred when her pants were up and her Friend had described another incident that occurred when the Victim's pants were down. The trial court acknowledged that the testimony was equivocal and could be interpreted as either inconsistent recollections of a single event or two descriptions of two different events. The motion to withdraw the plea was denied because appellant failed to carry his burden of proof, making a specific factual finding on this issue unnecessary.

Appellant renewed this same argument at sentencing when he contended that section 654 barred multiple punishments for the two oral copulation convictions. At this point the trial judge had had over two weeks to consider the issue. In sentencing appellant consecutively for both oral copulation with a child under the age of 14 years and forcible oral copulation the trial court implicitly found that each conviction was based on a separate and distinct act. The events described by the Victim and by her Friend are undoubtedly subject to the interpretation that two acts of oral copulation

occurred, one prior to the rape and one after. Because the trial court's ruling on the section 654 issue is supported by substantial evidence we will not disturb it on appeal.

DISPOSITION

The judgment and sentence are affirmed.

SIMONS, J.

We concur.

STEVENS, Acting P.J.

GEMELLO, J.